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OGC 81-00814

30 January 1981

MEMORANDUM FOR: Director of Central Intelligence

FROM: Daniel B. Silver
General Counsel

SUBJECT: Revision of Executive Order 12036: NSC Decisionmaking Structure [redacted] 25X1

1. In response to your tasking at Monday's morning meeting, as modified by our subsequent discussion, I have met with the DDO, D/NFAC, AD/RMS and Acting SA/DCI/CI to discuss modifications to Executive Order 12036 relating to the decisionmaking and approval process for covert action, sensitive collection and counterintelligence. This memorandum sets forth our joint recommendations. [redacted] 25X1

2. Background: E.O. 12036, while assigning to the National Security Council (NSC) responsibility for review, guidance and direction for the conduct of all foreign intelligence and counterintelligence activities, established two NSC committees to exercise these functions. In the process the Order added, for specified purposes, to the statutory membership of the NSC, which consists of the President, Vice President, Secretary of State and Secretary of Defense. [redacted] 25X1

3. The two committees are the Policy Review Committee (PRC) and the Special Coordination Committee (SCC).

a. Policy Review Committee. The PRC's functions are to establish requirements and priorities for national foreign intelligence, to review the NFIP budget, to conduct periodical evaluations of the quality of intelligence produced and to develop policy guidance. The PRC has met relatively infrequently for these purposes. The membership consists of: DCI (Chairman); Vice President; Secretaries of State, Treasury and Defense; Assistant to the President for National Security Affairs; and Chairman, Joint Chiefs of Staff.

b. Special Coordination Committee. The SCC has been the main group of "Principals" dealing with intelligence matters. Under the Executive Order the SCC is required to submit to the President a policy recommendation (and any dissenting views) on each proposed covert 25X1

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action. For this purpose the membership consists of: Assistant to the President for National Security Affairs (Chairman); Secretaries of State and Defense; Attorney General; Director, OMB; Chairman, Joint Chiefs of Staff; and DCI.

The Executive Order requires that the SCC should review those sensitive foreign intelligence collection operations reported to the Chairman, and by the Chairman to the SCC, under standards established by the President. When meeting for this purpose, the SCC includes: Secretaries of State and Defense; Attorney General; Assistant to the President for National Security Affairs; and DCI. The Order also gives the SCC various responsibilities for developing counterintelligence policy. Membership for this purpose includes: Secretaries of State and Defense; Attorney General; Director, OMB; Assistant to the President for National Security Affairs; Chairman, Joint Chiefs of Staff; DCI; and Director, FBI.

The Order requires the SCC to meet in person in order to carry out the foregoing duties. In addition, the Order requires the SCC to conduct an annual review of special activities and sensitive foreign collection intelligence operations. [redacted] 25X1

4. In it is our view that this structure has not worked well in a number of respects. The major problems have been:

a. The Executive Order has required "Principals" to become involved in too many decisions, many of them trivial. This has been especially troublesome with respect to covert actions. The requirement that the President not approve any covert action without a recommendation from the SCC, which must meet in person, has led to substantial delays in obtaining approvals for covert actions.

b. The Order and the procedures developed by the NSC staff have made no provision for formal working groups except in the area of counterintelligence. There has been a Counterintelligence Working Group to support the SCC(CI), and this generally has been viewed as working well. No similar staff support has existed for the other intelligence work of the SCC.

c. The committee structure established by the Order is unwieldy and has involved too many officials in decisions only tangentially related to their responsibilities. In particular, the involvement of the

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Attorney General and the Director, OMB, in a large number of covert action and intelligence issues has been not only unnecessary but often distinctly unhelpful. The necessary budgetary determinations or legal rulings could be obtained at a staff level without involving these officers in the deliberative process. [redacted] 25X1

5. CIA Proposal: The structure we would propose to replace the existing E.O. 12036 structure is intended to be simpler, to impose less on the time of Cabinet level officers and to make greater use of working groups at the sub-Cabinet and staff levels. The proposal would establish three levels of organization:

a. The NSC. For intelligence purposes the NSC would consist of the four statutory members (President, Vice President, and Secretaries of State and Defense), augmented by the DCI and the Assistant to the President for National Security Affairs. The NSC would constitute the highest level of policymaking and guidance for the conduct of intelligence activities and would consider those specific operations and recommendations referred by the Intelligence Committee.

b. Intelligence Committee. The Intelligence Committee would be the normal policymaking and approval recommending body for matters not deemed appropriate for consideration by the NSC. For approval of special activities and for review of sensitive collection operations, membership would consist of the DCI, the Deputy Secretary of State, the Deputy Secretary of Defense, the Assistant to the President for National Security Affairs, and the Chairman, Joint Chiefs of Staff. When meeting on counterintelligence matters, the committee would be augmented by the Director of the FBI and the Director of NSA.

c. Working Groups. The Intelligence Committee would be supported by two working groups, consisting of the same institutional membership, but represented at the Assistant Secretary level, with appropriate staff support. One working group would deal with counter-intelligence matters, the other with covert action matters. The latter working group would review all covert action proposals. When acting for this purpose, the working group would be augmented on an ad hoc basis by appropriate representatives of OMB and the Attorney General when issues of funding or legal issues are involved. The working group would be responsible for ensuring that each covert action proposal was fully staffed and coordinated, including resolution of all legal and budgetary issues, before presentation to

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the Intelligence Committee. If issues involving entities not represented on the Intelligence Committee could not be solved at the working group level, a Deputy Secretary level representative of the affected department or agency would be invited on an ad hoc basis to attend the Intelligence Committee meeting. [redacted] 25X1

6. Relation to State Department Proposal: The State Department proposal (consisting of three National Security Decision Directives) would restructure the NSC decisionmaking process in a manner that maximizes the authority of the Secretary of State and appears to submerge all intelligence matters within the context of either foreign policy or military policy formulation. The key document, draft National Security Decision Directive 2, contains the following key points:

a. NSC. The order provides that the NSC would be the proper forum for national security policy issues requiring Presidential determination. The order provides that "[h]eads of Departments and Agencies not statutory members shall participate as appropriate when matters affecting their Departments or Agencies are considered." Since the DCI is not a statutory member of the NSC, this means that the DCI would not be included as a matter of course in NSC deliberations on national security policy issues. This clearly is unacceptable. In addition, the order provides that the Secretaries of State and Defense respectively are responsible for preparing all NSC papers on foreign policy and defense policy matters. This appears to leave no room for preparation of papers by the Assistant to the President for National Security Affairs or by the DCI. This aspect of the order also is unacceptable, since it would deprive the Intelligence Community of the ability directly to present intelligence issues to the NSC.

b. Secretary of State and the SIG-FP. The draft directive assigns plenary authority over formulation and execution of foreign policy to the Secretary of State, to be assisted by the Senior Interdepartmental Group-Foreign Policy (SIG-FP). The SIG-FP would be made up of the Deputy Secretaries of State and Defense; DCI; Chairman, Joint Chiefs of Staff; and the Assistant to the President for National Security Affairs. In addition, each Assistant Secretary of State would chair an interdepartmental group at the Assistant Secretary level. Under the definitional provisions it is reasonably clear that most of the Intelligence Community's activities abroad would be brought under the authority and responsibility of the Secretary of State by the directive.

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This clearly derogates from the responsibilities of the DCI.

c. Secretary of Defense and the SIG-DP. The draft directive gives the Secretary of Defense authorities with respect to formulation and execution of defense policy that essentially parallel the authorities given the Secretary of State in the foreign policy area. The Secretary is to be assisted by a Senior Interdepartmental Group-Defense Policy (SIG-DP) with the same membership as the SIG-FP, and the Assistant Secretaries are to be supported by interdepartmental groups similar to those supporting the Assistant Secretaries of State. The definitions of the subject matter under the authority of the Secretary of Defense would appear to absorb all of the Intelligence Community's activities not put under the authority of the Secretary of State, with considerable overlap between the two. Obviously, this is unacceptable. [ ] 25X1

7. The proposed State Department directive has the effect--whether or not intentionally--of obliterating virtually all the authority of the DCI and subordinating the activities of the Intelligence Community to the overall authorities and responsibilities of the Secretaries of State and Defense. The reasons to oppose this are self-evident. If all intelligence matters were removed from the scope of the proposed directive, the remaining structure would not have an adverse impact on Intelligence Community interests and would appear to be workable, although there is some reason to fear that the proliferation of interdepartmental working groups at the Assistant Secretary level would be unwieldy. We recommend that the DCI's position with respect to the State Department's draft directives be that:

a. the DCI should be a member of the NSC for all purposes; and

b. intelligence and intelligence-related issues should be removed from the purview of these draft directives and handled by a separate review and decision-making process along the lines of the proposals set forth in this memorandum. [ ] 25X1

8. Draft Directive: Attached is a draft directive that could be used by the President to institute the decision-making mechanism recommended in this memorandum. [ ] 25X1

[ ] 25X1

Daniel B. Silver

Attachment

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Executive Order

REVIEW AND APPROVAL OF INTELLIGENCE ACTIVITIES

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended, and as President of the United States of America, in order to provide for the review and approval of United States foreign intelligence activities, it is hereby ordered as follows:

SECTION 1

REVIEW AND APPROVAL OF INTELLIGENCE ACTIVITIES

1-1. National Security Council.

1-101. Purpose. The National Security Council (NSC) was established by the National Security Act of 1947 to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security. The NSC shall act as the highest Executive Branch entity that provides review of, guidance for, and direction to the conduct of all national foreign intelligence and counterintelligence activities. Meetings of the NSC for this purpose shall be attended by the President and Vice President, or their designees; the Secretary of State; the Secretary of Defense; the Assistant to the President for National Security Affairs; and the Director of Central Intelligence. In addition, heads of other departments and agencies shall attend as appropriate when matters affecting their departments or agencies are considered.

1-102. The NSC shall be assisted in carrying out its responsibilities with respect to national foreign intelligence and counterintelligence activities by the Intelligence Committee, supported by interdepartmental working groups.

1-2. NSC Intelligence Committee.

1-201. Membership. The NSC Intelligence Committee shall be chaired by the Director of Central Intelligence. When considering recommendations to the President for approval of special activities, the Committee shall be composed of the Chairman; the Deputy Secretary of State; the Deputy Secretary of Defense; the Assistant to the President for National Security Affairs; and the Chairman, Joint Chiefs of Staff.

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When meeting to consider sensitive intelligence collection activities referred by the Director of Central Intelligence, the membership of the Committee shall be augmented, as necessary, by the head of each organization within the Intelligence Community directly involved in the activity in question. When meeting to consider counterintelligence activities, the Committee shall be augmented by the Director, Federal Bureau of Investigation and the Director, National Security Agency.

1-202. Duties. The NSC Intelligence Committee shall:

(a) Establish requirements and priorities for national foreign intelligence;

(b) Review such National Foreign Intelligence Program and budget proposals and other matters as are referred to it by the Director of Central Intelligence;

(c) Consider and submit to the President a policy recommendation, including all dissents, on each special activity; provided, however, that, if any member considers that such policy recommendation should be reviewed by the NSC, the NSC shall consider the matter and, unless the President is present at such consideration, shall submit an NSC recommendation to the President;

(d) Review proposals for sensitive foreign intelligence collection operations referred to the Committee by the Director of Central Intelligence;

(e) Develop standards and doctrine for the counterintelligence activities of the United States, resolve interagency differences concerning the implementation of counterintelligence policy, and develop and monitor guidelines, consistent with applicable law and Executive orders, for the maintenance of central counterintelligence records;

(f) Consider and approve any counterintelligence activity referred to the Committee by the head of any organization in the Intelligence Community;

(g) Submit to the NSC an overall annual assessment of the relative threat to United States interests from intelligence and security services of foreign powers and from international terrorist activities, including an assessment of the effectiveness of the United States counterintelligence activities;

(h) Conduct an annual review of ongoing special activities, sensitive national foreign intelligence collection operations and sensitive counterintelligence activities and report thereon to the NSC; and

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(i) Carry out such additional coordination, review and approval of intelligence activities as the President may direct.

1-203. Appeals. Any member of the NSC Intelligence Committee may appeal any decision thereof to the NSC.

1-3. Working Groups.

1-301. Working Groups. The NSC Intelligence Committee shall be assisted by two working groups composed of officials at the Assistant Secretary level. One working group shall deal with special activities and shall be composed of representatives of the Director of Central Intelligence; the Departments of State and Defense; the Assistant to the President for National Security Affairs; and the Chairman, Joint Chiefs of Staff, augmented, when necessary, by representatives of the Office of Management and Budget and the Department of Justice. This working group shall ensure that all proposals for approval of special activities by the NSC Intelligence Committee, the NSC and the President are accompanied by adequate statements of the foreign policy implications and by the position of the Director, Office of Management and Budget on any questions of funding and of the Attorney General on any issues of legality.

1-302. The second working group shall consider counter-intelligence matters and shall be composed of representatives of those departments and agencies represented on the NSC Intelligence Committee when it meets for the same purpose, augmented, when necessary, by representatives of the Director, Office of Management and Budget and the Attorney General.

1-303. Appeals. If issues affecting a department or agency not represented on the Special Intelligence Committee are raised at the working group level and are not resolved to the satisfaction of that department or agency, the affected department or agency shall be invited to participate in the meeting of the NSC Intelligence Committee considering the matter at issue.

1-4. Meetings.

1-401. Whenever possible, the work of the NSC Intelligence Committee and the working groups shall be accomplished at meetings at which all designated members, or their duly appointed representatives, are present. When such meetings are impracticable, or the issues involved do not warrant such a meeting, the NSC Intelligence Committee and the working groups can take action without meeting, as long as the views of each member are obtained in writing. The working groups may invite representatives of other departments and agencies not normally represented to attend meetings whenever deemed appropriate because of the issues to be considered.

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SECTION 2

REPEAL

Sections 1-1, 1-2 and 1-3 of Executive Order 12036 are hereby repealed.

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